

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ARCH INSURANCE COMPANY,

CASE NO. C09-0602 RSM

Plaintiff,

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND DENYING
DEFENDANT'S MOTION FOR
PARTIAL SUMMARY JUDGMENT

SCOTTSDALE INSURANCE
COMPANY, a foreign corporation; and
NORTHWEST TOWER CRANE
SERVICE, INC., a Washington
Corporation,

Defendants.

I. INTRODUCTION

This matter comes before the Court on Motion for Summary Judgment (Dkt. #30) brought by Plaintiff Arch Insurance Company (“Plaintiff”), and on Cross-motion for Partial Summary Judgment (Dkt. #34) brought by Defendant Scottsdale Insurance Company Defendant”). Plaintiff insurer claims in this action that Defendant insurer must compensate Plaintiff for its expenditures in defending the general contractor against liability connected to a

1 crane collapse. Defendant contends that it had no duty to defend the general contractor, and
 2 disputes the scope of Plaintiff's claims and the reasonableness of Plaintiff's expenditures.

3 **II. BACKGROUND**

4 In November 2006 during the construction of the "Tower 333 project" in Bellevue,
 5 Washington, a crane collapsed causing one fatality and extensive property damage. Lease
 6 Crutcher Lewis ("LCL"), Plaintiff Arch's insured, was the general contractor on this project.
 7 LCL employed Northwest Tower Crane Service, Inc. ("NWTC") as a subcontractor on the
 8 project to erect, test, and dismantle the crane that collapsed. NWTC had a general liability
 9 insurance policy with Defendant Scottsdale at the time of the collapse. As alleged in this suit,
 10 LCL qualified as an "additional insured" under the Scottsdale policy and that policy is primary
 11 over any other policy for the additional insured, causing Scottsdale to be responsible to defend
 12 and indemnify LCL.

13 Arch tendered the defense of LCL to NWTC and Scottsdale. Scottsdale denied any duty
 14 to defend LCL. Arch defended LCL and now seeks equitable contribution from Scottsdale.

15 **III. SUMMARY JUDGMENT STANDARD**

16 Summary judgment is appropriate where "the pleadings, the discovery and disclosure
 17 materials on file, and any affidavits show that there is no genuine issue as to any material fact
 18 and that the movant is entitled to judgment as a matter of law." FRCP 56(c); *Anderson v.*
 19 *Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The Court must draw all reasonable inferences
 20 in favor of the non-moving party. *See F.D.I.C. v. O'Melveny & Meyers*, 969 F.2d 744, 747 (9th
 21 Cir. 1992), *rev'd on other grounds*, 512 U.S. 79 (1994). In ruling on summary judgment, a
 22 court does not weigh evidence to determine the truth of the matter, but "only determine[s]
 23 whether there is a genuine issue for trial." *Crane v. Conoco, Inc.*, 41 F.3d 547, 549 (9th Cir.
 24

1 1994) (*citing O'Melveny & Meyers*, 969 F.2d at 747). Material facts are those which might
 2 affect the outcome of the suit under governing law. *Anderson*, 477 U.S. at 248.

3 **IV. DISCUSSION**

4 **A. Additional Insured Endorsement**

5 The interpretation of an insurance contract is a matter of law to be decided by a court.
 6 *McDonald v. State Farm Fire and Cas. Ins. Co*, 837 P.2d 1000 (1992). The first issue in this
 7 summary judgment order is whether Arch's insured, LCL, may be considered an "additional
 8 insured" under the Scottsdale policy held by NWTC.

9 **1. Primary or Excess Coverage**

10 In situations where multiple policies provide coverage, a court must determine whether
 11 the policies provide the same layer of coverage, or whether the policies provide multiple layers
 12 of coverage – i.e.; primary or excess coverage. THOMAS V. HARRIS, WASHINGTON INSURANCE
 13 LAW § 51.1 (Matthew Bender ed., 2nd ed. Lexis 2006) (*citing Millers Cas. Ins. Co. v. Briggs*,
 14 665 P.2d 891 (1983)). In reading the policies together, if the policies clearly allocate the
 15 responsibility between the insurers on the basis of being primary or excess, then the primary
 16 insurer is liable for the full amount up to the policy limit before another excess insurer has a duty
 17 to pay. *Id.* (*citing Mission Ins. Co. v. Guarantee Ins. Co.*, 683 P.2d 215, 219 (1984)). Therefore,
 18 where it is determined that the policies in fact do provide multiple layers of coverage, it is not
 19 necessary to engage in an analysis in order to allocate and apportion cost among multiple
 20 insurers that provide the same layer of coverage.

21 In the case at hand, it is necessary to determine the relationship between the layers of
 22 coverage provided by Scottsdale and Arch. The subcontractor, NWTC, had primary insurance
 23 coverage with Scottsdale. The general contractor, LCL, had primary insurance coverage with
 24 Arch. (Dkt. #30 at 1-2). However, an endorsement to the Scottsdale policy includes as an

1 additional insured any organization for which NWTC is performing operations when NWTC and
 2 such organization have agreed in a written contract that the organization shall be added as an
 3 additional insured. (Dkt. #31, Ex. 2, at 12, ¶ 1.1.2(a)). Moreover, the endorsement states that an
 4 organization is an additional insured with respect to liability arising out of NWTC's ongoing
 5 operations performed for that insured. (Dkt. #31, Ex. 3, at 4). Per the endorsement, the status as
 6 an additional insured will end when NWTC's operations for that insured are complete. *Id.* The
 7 written contract between NWTC and LCL stated that the subcontractor's liability insurance shall
 8 be primary with respect to the general contractor, and that any other insurance maintained by the
 9 contractor shall be excess and not contributing. (Dkt. #31, Ex. 3, at 4).

10 In reading the policy and the language of the contract, the terms indicate that NWTC's
 11 Scottsdale policy was to be the primary insurer under certain circumstances. Rather than
 12 providing the same layer of coverage, which would permit apportionment among the multiple
 13 insurers, LCL's insurance (Arch) was "excess and not contributing" to NWTC's insurance
 14 (Scottsdale) with regard to liability arising out of NWTC's ongoing operations. (Dkt. #31, Ex. 3,
 15 at 4). If Arch incurred costs defending LCL from liability that arose from NWTC's "ongoing
 16 operations performed for [the additional] insured," then Scottsdale would be the primary insurer
 17 and hence would be responsible for those costs. (Dkt. #31, Ex. 3, at 4).

18 **2. The Meaning of "Arising Out of"**

19 Arch and Scottsdale dispute the meaning of the term "arising out of." The issue of
 20 whether LCL is an additional insured under the Scottsdale policy hinges on whether LCL
 21 incurred "liability arising out of [NWTC's] ongoing operations performed" for LCL. (Dkt. #31,
 22 Ex. 3, at 4). The "arising out of" language in the context of an additional insured was examined
 23 in *Equilon Enterprises v. Great American Ins. Co.*, 132 P.3d 758 (2006). The defendant
 24 insurance company argued that Shell was not covered as an additional insured because the

1 endorsement only covered *injuries* arising out of the distributor's operations. However, the
 2 opinion states that the additional insured endorsement at issue in that case covered the broader
 3 category of *liability* arising out of the operations. The *Equilon* decision noted that the "arising
 4 out of" language of similar additional insured endorsements is broad. *Equilon Enterprises*, 132
 5 P.3d at 761.

6 Rather than examine whether an injury actually occurred as a result of the policy holder's
 7 operations, the crucial inquiry is whether, "facts, which if proven, impose liability within the
 8 policy's coverage." *Equilon Enterprises*, 132 P.3d at 760 (citing *Unigard Ins. Col. v. Leven*, 983
 9 P.2d 1155 (1999)). Therefore, if the claims alleged are clearly not covered by the policy, then
 10 there is no duty to defend. *Id* (citing *Cle Elum Bowl Inc. v. North Pac. Ins. Co.*, 981 P.2d
 11 (1999)). However, where the potential for liability is present due to a covered claim, an insurer
 12 has a duty to defend based on the facts that could give rise to liability.

13 Similarly in the case at hand, Scottsdale argues that LCL cannot be an additional insured
 14 because NWTC was not negligent in performance of its operations, and therefore liability did not
 15 arise and could never have arisen out of NWTC's operations. This misconstrues the language of
 16 the additional insured endorsement. It is not material that NWTC, the original holder of the
 17 Scottsdale policy, was ultimately found not to be negligent. Instead, LCL was an additional
 18 insured with respect to "liability arising out [NWTC's] ongoing operations performed for
 19 [LCL]." (Dkt. #31, Ex. 3, at 4). Therefore, per the additional insured endorsement, Scottsdale
 20 had a duty to defend LCL unless the alleged claims were clearly not covered under the policy.
 21 Here, the potential for liability arose from NWTC's operations when the crane collapsed, even
 22 though NWTC was found not to be negligent in causing the crane to collapse. Scottsdale's duty

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1 to defend LCL was triggered, as set forth by the additional insured endorsement of the Scottsdale
 2 policy.

3 **3. Meaning of “Ongoing Operations”**

4 The language of the endorsement regarding the additional insured limited the insurance to
 5 liability arising out of the subcontractor’s “ongoing operations for that insured.” Defendant
 6 Scottsdale argues that NWTC’s operations were not ongoing because the collapse of the crane
 7 rendered additional operations, notably the dismantling of the crane by NWTC, impossible.
 8 NWTC’s operations specifically included the dismantling of the crane. (Dkt. #31, Ex. 2,
 9 Attachment B and C, at 21-28).

10 Washington courts have provided some guidance in determining whether operations are
 11 ongoing for purposes of interpreting additional insured endorsements. In *Hartford Ins. Co. v.*
 12 *Ohio Cas. Ins. Co.*, the Washington Court of Appeals adopted the language of a California
 13 decision interpreting the meaning of “ongoing operations.” 189 P.3d 195, 202 (2008) (citing
 14 California decision, *Pardee Construction Co. v. Ins. Co. of the West*, 92 Cal.Rptr.2d 443 (2000)).
 15 The *Hartford* decision notes that “the endorsement evinces an intent to provide coverage to the
 16 additional insured only for liability that arises while the work is still in progress. An example of
 17 such liability would be ‘a course of construction work site accident involving bodily injury or
 18 property damage.’” *Hartford*, 189 P.3d at 201 (citing *Pardee*, Cal.Rptr.2d at 458).

19 In the case at hand, the crane had already been erected by NWTC. The fact that the crane
 20 was in use at an active construction work site when the accident occurred is sufficient to
 21 constitute “ongoing operations” as stated by the endorsement. It is not relevant that the collapse
 22 resulted in the impossibility of NWTC’s completion of its operations, as argued by Scottsdale.
 23 Rather, the controlling fact is that the accident that gave rise to the potential liability occurred
 24 while the crane’s operation was ongoing during the course of construction.

1 **B. Defense Costs**

2 **1. Right to Recover Pre-Suit Costs**

3 Having found that LCL is an additional insured with respect to the Scottsdale policy, the
 4 Court now turns to the scope of fees and costs that Arch may recover. Scottsdale argues that pre-
 5 suit costs are not recoverable because Scottsdale is not responsible for expenses that were
 6 incurred by LCL or Arch prior to the filing of the first suit. (Dkt. #34 at 15). However, there is
 7 no authority to support this proposition. The duty to defend is broad and encompasses those
 8 expenses that are reasonably related to the defense of a covered claim. *Potomac Elec. Power Co.*
 9 *v. California Union Ins. Co.*, 777 F.Supp. 980 (D.C. 1991). In *Nordstrom v. Chubb*, this court
 10 specifically held that “[n]o right of allocation exists for the defense of non-covered claims that
 11 are ‘reasonably related’ to the defense of covered claims.” 820 F. Supp. 320, 536 (W.D. Wash.
 12 1992), *aff’d on other grounds*, 54 F.3d 1424 (9th Cir. 1995). Therefore, where the duty to defend
 13 necessarily encompasses certain pre-suit expenses, those expenses will not be allocated as
 14 distinct.

15 The issue of whether costs are reasonably related to the defense of covered claims is a
 16 factual inquiry. *Potomac*, 777 F. Supp at 985. In this case, Plaintiff Arch has explained that its
 17 pre-litigation costs were incurred in storing the remains of the crane, retaining experts to
 18 examine the crane in preparation for litigation, making efforts to settle, and advocating for LCL
 19 during investigations. Dynan Decl. at ¶¶ 4, 6, 7, 9. Scottsdale does not plead sufficient evidence
 20 to raise an issue of fact as to whether the pre-suit costs were reasonably related to the defense of
 21 covered claims.

22 Scottsdale further asserts that Arch may not recover pre-suit expenses because Arch
 23 voluntarily paid these costs. An insurer who acts as a volunteer in making payments loses the
 24 right to recover contribution from other insurers. *Hartford Ins. Co. v. Ohio Casualty Ins. Co.*,

1 189 P.3d 195 (2008). An insurer is considered a volunteer if the insurer has no right or interest
 2 of its own to protect and is under no obligation to pay. *Id.* However, payments made by an
 3 insurer under the threat of civil suit are not considered voluntary, nor is the existence of a
 4 possible defense to coverage sufficient to render an insurer's actions voluntary. *Id.*

5 In this case, Arch's pre-suit expenses cannot be considered voluntary for purposes of
 6 determining whether Arch waived its right to subrogation or contribution. Given the situation of
 7 the crane collapse, Arch operated under the near certainty that claims and litigation would
 8 follow. As LCL was Arch's insured, it cannot be said that Arch had no obligation to make
 9 expenditures to facilitate the defense of its insured. Finally, the possibility that Arch was not the
 10 primary insurer does not render its actions voluntary.

11 **2. Right to Recover Pre-Tender Defense Costs**

12 Scottsdale asserts that Arch cannot recover pre-tender defense costs. However,
 13 Washington courts have rejected a rule that disallows the recovery of pre-tender defense costs.
 14 *Griffin v. Allstate Ins. Co.*, 29 P.3d 777, 781 (2001). Rather, the duty to defend an insured is
 15 defined by contract, and an insurer cannot be released from the duty to defend absent a
 16 substantial showing of prejudice as a result of late tender. *Id.* at 782.

17 As noted *supra*, the language of the additional insured endorsement is construed broadly,
 18 and indicates Scottsdale had a broad duty to defend LCL. Furthermore, Scottsdale has not
 19 pointed to any facts that show tender was late, or that Scottsdale was prejudiced in any way as a
 20 result of late tender.

21 **3. Right to Recover Fees Paid Post-Judgment**

22 Scottsdale further disputes whether Arch may recover post-judgment fees, arguing that
 23 the duty to defend is terminated upon a judicial declaration regarding the absence of liability on
 24 the part of the insured, NWTC. As stated in *Goodstein v. Continental Casualty Co.*, “[a]n

1 insurer's duty to defend is a continuing one, and does not end until the underlying action is
 2 resolved or it is shown that there is no potential for coverage.”). 509 F.3d 1042, 1056 (2007)
 3 (quoting *Overton v. Consol. Ins. Co.*, 38 P.3d 322, 334 (2002)).

4 In the present case, when inquiring into the duty to defend, the relevant party who is
 5 owed that duty is LCL because LCL is the additional insured of Scottsdale. As long as LCL is
 6 an additional insured, it is irrelevant that the policy-holder NWTC was ultimately held not to be
 7 liable. Rather, the duty to defend terminates upon the resolution of the underlying claims and
 8 litigation against LCL. Because LCL remained an active party in litigation, it cannot be said that
 9 Arch’s expenses were incurred post-judgment. Therefore, Arch’s costs incurred after the
 10 dismissal of claims against NWTC may be recovered.

11 **4. Reasonableness of Fees**

12 Scottsdale claims that the defense costs incurred by Arch in defending LCL are
 13 unreasonable. Washington courts apply the lodestar method to determine reasonableness of
 14 attorneys’ fees in the absence of a contractually predetermined method. *Crest Inc. v. Costco*, 115
 15 P.3d 349, 356 (2005). “The lodestar approach sets fees by multiplying a reasonable hourly rate
 16 by the reasonable number of hours spent on the lawsuit. This method dictates that attorney fees
 17 are calculated by establishing a lodestar fee and then adjusting it up or down based on other
 18 external factors.” *Id.* The determination of whether attorneys’ fees are reasonable under
 19 specific circumstances is a question of fact. *Schmidt v. Cornerstone Inv., Inc.*, 795 P.2d 1143,
 20 1153 (1990).

21 The issue of the reasonableness of the costs incurred by Arch cannot be determined on
 22 summary judgment. Scottsdale and Arch present conflicting issues of fact as to what constitutes
 23 acceptable attorneys fees and costs in this case. (Dkt. #34 at 19-20, Dkt. #41 at 20-25.) This
 24 Court cannot weigh such evidence to determine the truth on a motion for summary judgment, but

1 can only determine whether there is a genuine issue of fact for trial. *Crane v. Conoco, Inc.*, F. 3d
2 547, 549 (9th Cir. 1994).

3 **5. “Olympic Steamship” Fees**

4 Arch asserts that it is not seeking recovery of its costs incurred in litigating this action
5 against Scottsdale (Dkt. #41), and therefore Arch makes no claim for “Olympic Steamship” fees.

6 **V. CONCLUSION**

7 Having reviewed the relevant pleadings, the declarations and exhibits attached thereto,
8 and the remainder of the record, the Court hereby finds and ORDERS:

9 (1) Arch Insurance Company’s Motion for Summary Judgment (Dkt. #30) is GRANTED
10 as to (a) the issue of Arch’s policy being excess to the Scottsdale policy; and (b) the
11 issue of LCL’s status as an additional insured under the Scottsdale policy.

12 (2) Scottsdale Insurance Company’s Cross-motion for Partial Summary Judgment (Dkt.
13 #34) is DENIED as to (a) the issues stated above; (b) the issue of the scope of Arch’s
14 claims for contribution concerning the inclusion of pre-suit costs, pre-tender costs,
15 and post-judgment costs -- these costs are encompassed within the duty to defend as a
16 matter of law; and (c) the issue of the reasonableness of fees and costs. The
17 reasonableness of fees and costs is a question of fact that cannot be determined on
18 motion for summary judgment. As such, the issue of reasonableness of fees and costs
19 is RESERVED for trial.

20 Dated October 27, 2010.

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23 RICARDO S. MARTINEZ
24 UNITED STATES DISTRICT JUDGE